No. 1007

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1941

WILLIAM H. LANGROISE, as Executor of the Will of James McDonald, Jr., *Petitioner*,

vs.

WILL CUMMINGS, Individually, and WILL CUMMINGS, as Trustee, *Respondent*.

Respondent's Brief in Opposition to Petition for Certiorari

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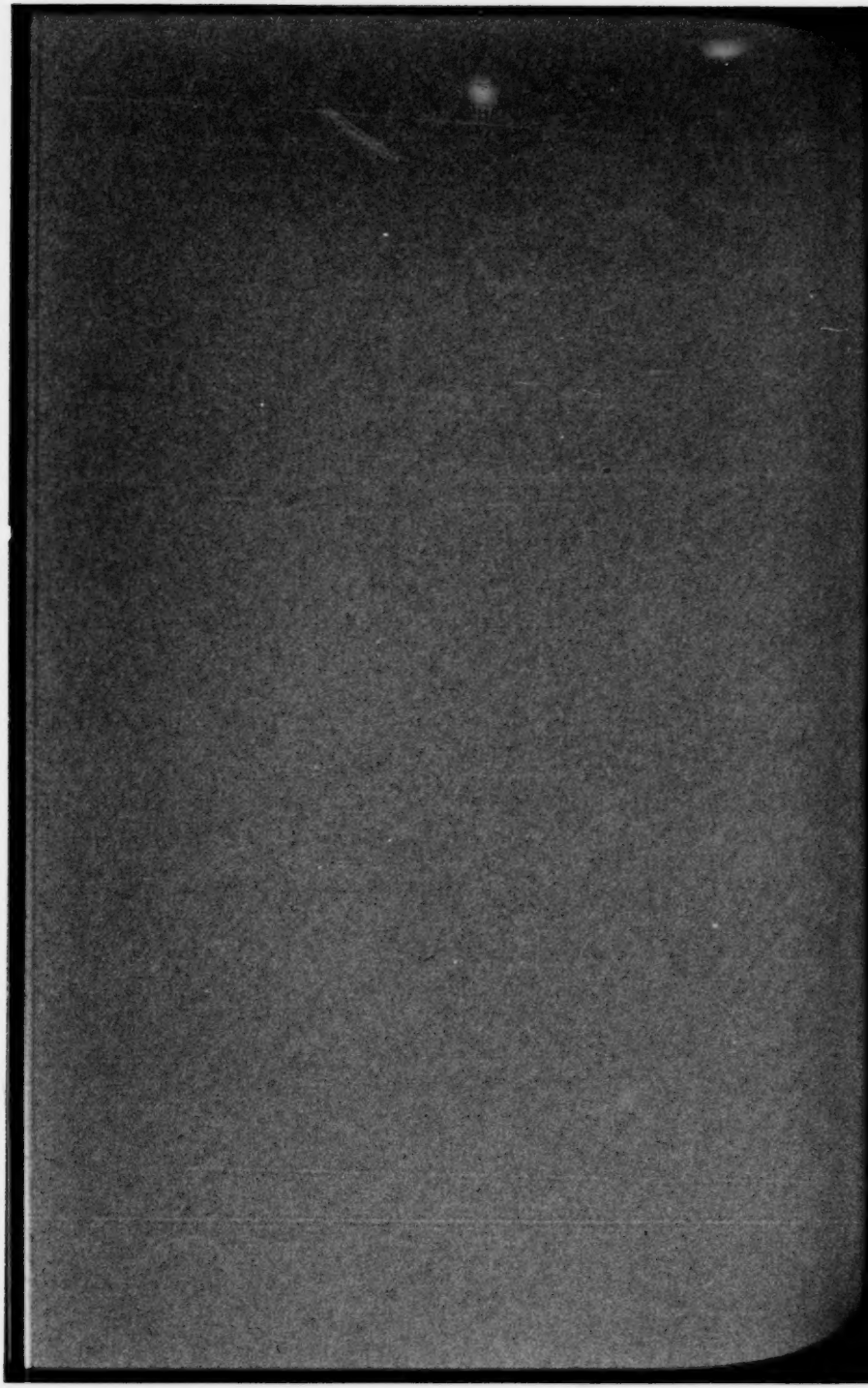

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Respondent respectfully submits that the petition for a writ of certiorari should not be granted, because:

(a) The petition does not present questions of such importance as to justify the granting of the writ;

(b) The Circuit Court of Appeals did not decide any question of local law in a way probably in conflict with applicable local statutes or local decisions.

Both the District Court and the Court of Appeals agreed on the facts and followed the decisions of the Idaho Supreme Court in their application of the statutes involved, which seem too clear to require construction. The District Judge had been a member of the Idaho Bar

for about forty-five years and Judge William Healy, who wrote the opinion for the Circuit Court of Appeals, had been a member of the Idaho Bar for approximately thirty-three years. They are both thoroughly familiar with Idaho statutes and Idaho practice and procedure.

STATEMENT OF FACTS

Petitioner's statement of facts needs clarification. The printed record is also confusing in that Paragraph XII of the original complaint was omitted in the printing and the amended paragraph is set out on pages 60 to 73 of the record. The complaint, therefore, as amended, will be found on pages 1 to 80, and it includes a few exhibits that were printed in whole or in part, but other important exhibits, whether attached to the complaint or introduced in evidence, considered by both the Trial Court and the Circuit Court of Appeals, are not included in the printed record.

The complaint sets forth at some length a history and statement of the transactions which formed the basis of respondent's claim.

The evidence was unusually full and complete and sustained the facts as pleaded in the complaint, and the Trial Court found the facts as alleged (T. 119-142). In brief, the facts are as follows:

The decedent, variously referred to as "James McDonald," "James McDonald, Jr." and simply "Jim," was the son of James McDonald, Sr., who died in January, 1915, leaving a will which disposed of property, which by 1926 had a value of upwards of five million dollars, to James

McDonald, Jr., and the latter's children, with a provision that there could be no distribution of the corpus of the estate until the eldest son of James McDonald, Jr., reached the age of thirty years, which would be about September 10, 1942 (T. 119). Pending such distribution the estate was to be managed by Fulton Trust Company of New York and Lawrence Maxwell of Cincinnati as trustees. Maxwell was later succeeded by Joseph F. Graydon, also of Cincinnati, as co-trustee. Pending the distribution of the corpus James McDonald, Jr., was entitled to receive an annuity of $25,000.00.

The estate of McDonald, Sr., was probated in the District of Columbia. In 1926, in an action brought by James McDonald, Jr. (12 Fed. [2] 822), it was ordered that the trustees should pay to him, in addition to the annuity of $25,000.00, the annual income of his share (one-half) of the testamentary estate, which petitioner states (page 25) amounted to upwards of $130,000.00 per year prior to the depression.

James McDonald, Jr., notwithstanding his large income, became indebted to numerous people in amounts aggregating several hundred thousand dollars (T. 121). Some of the creditors were secured by assignments providing for payment out of the corpus upon termination of the trust in 1943. Other assignments provided for payment out of income and the annuity, and many creditors had no security. In 1931 the unsecured creditors demanded payment; some, including Martin Littleton of New York, who had been the decedent's attorney, obtained judgments and threatened to levy upon and sell the decedent's interest in the testamentary trust.

Sale thereof would have deprived decedent of all income and of all his interest in the testamentary trust. To avoid the approaching catastrophe to his fortune the decedent attempted, in the fall of 1931, to borrow money by assigning as security his interest in the trust and thus provide for an income sufficient for his own living expenses and funds that he could pro rate to the unsecured creditors until payment could be made from the testamentary trust. Because of the depression and uncertainty as to the terms of the trust, he was unable to obtain any loan from banks, loan agencies, and other institutions to whom he and his friends applied for relief.

As a last resort decedent applied for relief to the respondent, Will Cummings, an old friend, of Chattanooga, Tennessee, and the lay judge of the County Court of Hamilton County. Judge Cummings was neither a lawyer nor a money lender, and the Court found that the respondent (T. 122):

> "For the purpose of assisting said James McDonald, Jr., and his family, *and not otherwise*, consented to loan to said James McDonald, Jr., $50,000.00 for immediate use in securing adjustments with his creditors and extensions of time within which to pay the balance; that respondent agreed to make such loan upon the terms and conditions set forth in certain documents, all executed on and dated December 17, 1931, by said James McDonald, Jr." (Here follows a description of the documents.)
>
> "That the said notes and the said contracts were

all executed and delivered at the same time and as part of the same transaction" * * *

The Court found (T. 123) that the decedent assigned to the respondent:

> "All his share and interest in the testamentary trust, including the corpus and principal thereof, income and annuity, not previously transferred or assigned; that such assignment was made as security for the payment of said notes and interest thereon, and for further sums advanced as therein provided, and by said assignment said Will Cummings was authorized and empowered to receive and collect from the testamentary trustees, and they were authorized and directed to pay to said Will Cummings, all moneys which, except for said assignment, would be payable to said James McDonald, Jr., under said testamentary trust."

Both the District Court and the Circuit Court of Appeals found and held that by the various contracts and assignments so made by the decedent Will Cummings was trustee for the unsecured creditors, for himself, and for James McDonald, Jr.; that out of the moneys received he had the right to pay McDonald's indebtedness to respondent as the obligations matured, and he was required to pay $2,000.00 per month to the decedent for his personal use and living expenses, and the balance he was directed to apply pro rata to the payment of creditors.

The testamentary estate consisted largely of stocks of the Standard Oil companies, the dividends from which were substantially reduced during 1932 and thereafter. The decedent failed to pay his Federal income tax, with the result that the Collector of Internal Revenue, in July, 1935, filed a lien for upwards of $30,000.00 on the assets in the hands of the testamentary trustees, who thereupon refused to make any payment either to the respondent or the decedent (T. 130). From the filing of said lien until decedent's death on July 2, 1936, upon the urgent request of petitioner as counsel for decedent and upon the entreaties of decedent, his wife, and friends, respondent advanced to the decedent and his family for necessary living expenses large sums, out of his personal funds, which were secured under Exhibit D (T. 32). Respondent borrowed money as trustee and personally guaranteed the payment thereof in order to make advantageous settlements with creditors who were in need of cash. The Court found that by so doing respondent saved the estate upwards of $48,000.00 (T. 136), but it actually aggregated over $50,000.00. Respondent paid out under his trust upwards of $200,000.00, of which about $125,000.00 was received from the testamentary trustees and the balance was from money loaned to the decedent or the trust by respondent, or money which he borrowed as trustee and for which he was personally liable as endorser or guarantor.

Respondent, in order to better protect the decedent's estate, make advantageous settlements, and prevent creditors from attaching the assets in the testamentary trust, applied practically none of the money which he received

from the testamentary trustees to his own accounts or for the payment of the amount due him from the decedent or to the payment of the salary which it was agreed he should have, but the money was applied to the payment of what the decedent owed to other creditors or paid to the decedent for his living expenses; and the trustee's (respondent's) accounts and reports showing the application of all funds in the respondent's hands as trustee were approved in writing by the decedent (T. 262 and 50, and Exhibits 27 and 28 not in printed record).

Petitioner takes the untenable position that respondent should have applied the money which he received from the testamentary trustees to the payment of the amount due respondent before paying anything to the decedent and other creditors, and having failed to do so he should not now be permitted to recover anything. The simple answer to that is that had he followed that course the decedent would have had no money for living expenses and the other creditors would have attached and sold the assets in the testamentary trust and there would have been no estate for the petitioner to administer upon. Furthermore, decedent repeatedly approved in writing the course followed by respondent. The Circuit Court of Appeals says the course followed by respondent was obviously for McDonald's benefit (T. 454-455).

James McDonald, Jr., died on July 2, 1936. At that time respondent, as trustee, was entitled under his assignments, to all assets held by the testamentary trustees. Up to that time he had drawn no compensation for his services, extending over more than four and a half years. He claimed and was allowed $2,500.00 a year for that

period, or a total of $11,250.00. After the death of James McDonald, Jr., petitioner made a demand on the testamentary trustees for distribution of decedent's share (one-half) of the testamentary trust. The testamentary trustees in September, 1937, commenced an action in the District Court of the United States for the District of Columbia for instructions as to their duties under the trust. That Court held in substance that the death of James McDonald, Jr., terminated the testamentary trust and that a distribution should be made of his share.

Paragraphs 14 to 18, inclusive, of respondent's complaint (T. 12-17) set forth respondent's position as to how petitioner obtained possession of the assets which had been assigned to respondent as security (see also Findings, T. 139). In brief, the facts are that respondent relied upon an agreement with petitioner that sufficient assets, subject to respondent's assignments, were to be retained by the testamentary trustees in the District of Columbia to enable respondent to close up his trust and pay all obligations for which he as trustee was liable, and the indebtedness to himself. In violation of that agreement and unbeknown to respondent, petitioner obtained possession of all assets held by the testamentary trustees for the decedent and they were promptly removed to the State of Idaho. Later, under the pretense of carrying out the agreement, petitioner, as executor of the estate, placed certain corporate stock certificates which had been transferred to petitioner as executor, in a safe deposit box in the Riggs National Bank in the city of Washington (T. 139-140), and thereupon his counsel, Senator D. Worth Clark, notified respondent that unless

he promptly commenced an action in the courts of the District of Columbia to assert his rights to the securities they would again be removed to the State of Idaho (Exhibit 10, not in printed record). Respondent promptly (September, 1939) commenced a suit to impress his lien under his assignments upon the stock certificates which had been transferred to petitioner as executor and deposited as aforesaid, but service of process could not be obtained upon petitioner in the District of Columbia and his counsel moved to dismiss the action for want of jurisdiction, as the assets were then the property of the executor and the latter could not be sued in a foreign jurisdiction without his consent. That action was accordingly dismissed in January, 1940.

Within the time required by law after the death of the decedent and the publication of notice to creditors to file claims, respondent filed his claim with petitioner as executor. The District Court found that the claim was in due form (T. 146) and the Court of Appeals said:

> "On appeal the executor does not appear to argue this point, contenting himself with certain objections of a highly technical nature directed toward some of the trustee items." (T. 456.)

Under the statute (Sec. 15-607, I.C.A.), it was the duty of petitioner to either approve or reject the claim within sixty days after it was filed, but petitioner held the claim for approximately two years and eight months (February 21, 1937, to November 10, 1939), or until it was obvious that the Court for the District of Columbia

had no jurisdiction, in view of petitioner's objection, of respondent's suit to recover the securities, and petitioner then rejected the claim in toto without explanation.

Within the time required by law respondent commenced his action in Idaho, not only to recover on the items embraced in the claim so filed and rejected, but to enforce his right to the securities, the possession of which had been wrongfully obtained by petitioner but were still subject to respondent's trust under the assignments.

The District Court held that petitioner took the securities from the testamentary trustees with notice and knowledge of respondent's assignment thereof and lien thereon, but contrary to our contention the Court held that respondent had a lien for only $77,150.16, plus interest thereon, and that the remaining $12,630.98 of respondent's claim, plus interest thereon, was not secured but was a claim against the estate, to be paid in due course of administration (T. 147-148). Apparently the Circuit Court of Appeals was of the opinion that respondent should have been decreed a lien for all items in his claim, for the opinion of that Court says (T. 455):

> "We believe the relief granted by the Trial Court was not as full as that to which Cummings was entitled; but of this the executor is in no position to complain. Under the circumstances there was no reversible error in decreeing that the trustee items be paid in due course of the administration of the estate, nor in adjudging part of these items to be lienable."

Respondent, as trustee under the assignments made by the decedent, has been put to much expense for attorneys' fees and otherwise, and he has been deprived of the right to close his trust and pay the obligations which he had incurred and was required to pay as trustee. Petitioner's contention as to whether certain items were proper charges against the estate, whether they were included in the account filed with the executor, etc., are of no practical importance. Such contentions are but quibbles over technicalities, for the items were secured by all assets which petitioner received from the testamentary trustees.

The estate is large and the securities subject to respondent's lien and trust are ample for the payment of respondent's judgment. As trustee he is entitled to compensation for his services, which were most valuable to the decedent, and to payment for the obligations he has incurred for counsel fees, and it is of little moment whether the attorney's fees are recovered under the provisions in the notes for the payment of such fees or are recovered under the general law of trusts and trustees.

ARGUMENT

No Controversy Over the Facts

The findings of the District Court cover every issue of fact. The findings were sustained by the Circuit Court of Appeals and they are sustained by the uncontradicted evidence. Much of the evidence consisted of exhibits not printed in the record but certified by the District Court to the Court of Appeals for use on appeal. By order of

that Court made June 20, 1941, and a certified copy of which is on file with the Clerk of this Court, it was ordered:

> "That counsel for the respective parties may, in their briefs, refer to and quote from any of the exhibits in this cause on file with the clerk of this Court which they may deem pertinent to the issues on appeal, notwithstanding such exhibits have not been printed as part of the record."

In view of the condition of the record filed in this Court with the application for the writ of certiorari we shall assume that this Court will follow the customary rule that the petitioner's contention that certain items are not sustained by the evidence *can not overcome the weight of the findings of two Courts.*

Texas & P. R. Co. vs. Railroad Commission, 232 U.S. 338, 58 L. Ed. 630.

Brewer-Elliott Oil and Gas Co. vs. United States, 260 U.S. 77, 86; 67 L. Ed. 140, 145.

Washington Securities Co. vs. United States, 234 U.S. 76, 58 L. Ed. 1220, 1222.

The Statute of Limitations

Petitioner's argument rests on strained technicalities in applying to the facts of the case the provisions of the statutes, contracts, and the law as to the duties and powers of respondent as trustee under decedent's contracts of December 17, 1931 (Exhibits A, T. 21; B, T. 26; D, T. 32; F, T. 57).

Petitioner avoids any discussion of the merits of respondent's claim and of the equities in his favor. He makes the novel contention that the statute of limitations ran against respondent's claim while it was on file with the executor (petitioner) and presumably being examined and investigated preliminary to rendering a decision on the allowance thereof.

Petitioner concedes that not a single item in respondent's claim was barred by the statute of limitations when James McDonald, Jr., died on July 2, 1936, or when the claim was filed with petitioner in February, 1937. Petitioner held the claim until November 10, 1939—over two years and eight months—presumably for the purpose of considering the correctness of the items and the liability of the estate for the payment thereof. He sought no information about the claim from anyone and finally rejected it without explanation.

Section 15-607, I.C.A., provides:

> "When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator he must, within sixty days after its receipt, endorse thereon his allowance or rejection, with the day and date thereof * * *. If the claim is presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time."

Section 15-611, I.C.A., provides:

> *"No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator,"* (our italics)

and Section 15-609 provides:

> "When a claim is rejected * * * the holder must bring suit in the proper Court against the executor or administrator, within three months after notice of its rejection."

The petitioner, acting upon the strange theory—without support from either Idaho statutes or court decisions—that the statute of limitations would run against the claim while he held it under advisement, apparently assumed that he had held it *long enough to bar all items,* for he rejected the claim in its entirety, although he conceded in his brief in the Circuit Court of Appeals that items to the amount of $3,250.00 had not been barred, and that the respondent should have judgment therefor with interest, and in his petition in this Court for the writ of certiorari he concedes (page 13) that items in the principal sum of $4,962.50 had not been barred and should have been allowed.

Petitioner's contention that the courts below have decided an important question of local law in a way probably conflicting with applicable local decisions is so wholly unfounded as to challenge attention to the purpose or motive that prompts such contention. Petitioner and his counsel surely know that the theory they now advance would upset the construction that the Idaho Bar and the Idaho Courts have from the very beginning

of our territorial government placed on the applicable statutes.

The rule heretofore accepted and followed in Idaho is in substance to the effect that the general statute of limitations is suspended upon the death of the debtor, and that from thence on the filing of claims and the collection thereof from the estate of the deceased is controlled by the probate law and statutes of nonclaim, and not by the general statute of limitations.

The district judge who tried this case had been a member of the Idaho Bar for upwards of forty-five years and Judge William Healy, who wrote the opinion for the Circuit Court of Appeals, had been a member of the Idaho Bar for approximately thirty-three years. But this Court does not even need to apply here the rule on which it decided the case of MacGregor vs. State Mutual Life Insurance Company, February 16, 1942. There were no court decisions in Michigan construing the statute there involved, and this Court said:

> "in the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan Federal Judge of long experience and by three Circuit Judges whose circuit includes Michigan."

In the State of Idaho the highest court of the state passed directly on the question in the case of Wormward vs. Brown, 50 Idaho 125, 294 Pac. 331. The Court points out certain changes that had been made in the Idaho Probate statutes by an amendment in 1929 which

materially affected the procedure. At one time the statute provided that if the executor or administrator, or probate judge refused or neglected for *ten days* after the claim had been presented to him to endorse his allowance or rejection on the claim *"such refusal or neglect is equivalent to a rejection."* The words quoted were eliminated from the statute and the period of ten days was extended to sixty days and since 1929 the statute has read as set out in Section 15-607, supra.

In Wormward vs. Brown the complaint alleged that the claim had been filed but that "no action was ever taken by said defendant thereon either by way of allowance or rejection and that the time for action thereon had expired." The Court sustained a demurrer to the complaint. An examination of the official record in the office of the Clerk of the Supreme Court shows the following facts: The debtor died on January 14, 1929. The executrix was appointed with reasonable promptness. Notice to creditors was published on March 22, 1929, and the claim filed with the executrix on July 12, 1929. The *executrix having taken no action on the claim,* the claimant filed his action against the executrix for the collection of his claim on December 14, 1929—*144 days* after the claim had been filed. Upon the facts as disclosed by the record the Court sustained the demurrer and the Supreme Court in affirming the judgment said:

> "The only question remaining in this case is whether the claim must be filed and *rejected before suit can be maintained,* and if so, whether the *failure of the executrix to allow or reject the claim* as set forth

in the complaint, *amounts to a rejection*, authorizing suit on the claim as a rejected claim. In Flynn vs. Driscoll, 38 Ida. 545, 34 A.L.R. 352, 223 Pac. 524, this Court said:

"'Supporting the view that an action can not be maintained upon a claim against an estate until it has been first presented to the executor or administrator substantially in the manner prescribed by the statute, and rejected, and hence such suit' (the suit itself) 'can not be sufficient presentation, see also the following: Burke vs. Unger, 88 Okla. 226, 212 Pac. 993; First Security & Loan Co. vs. Englehart, 107 Wash. 86, 181 Pac. 13; Dakota Nat. Bank vs. Kleinschmidt, 33 S.D. 132, 144 N.W. 934; Printz-Biederman Co. vs. Torgeson, 41 S.D. 48, 168 N.W. 796; Dillabough vs. Brady, 115 Wash. 76, 195 Pac. 627.'

"The statement of the Court in Flynn vs. Driscoll, supra, is broader than the decision rendered in that case required, but *we are convinced the statement of the law is correct, and hold that at the time the claim in question was filed, which was on the twelfth day of July, 1929, the law contemplated before an action might be maintained upon such a claim against the estate of a deceased person, the claim must have been filed and disallowed, as provided by the statute*, and such action brought within three months after such disallowance, and *that mere failure to act on the part of the executor or administrator upon a filed claim within the time* (60 days) prescribed by C.S., Sec. 7584 as amended, *does not amount to a disallowance of the claim*. It follows the District Court was right in

sustaining the demurrer in this case because it does not appear from the complaint that the claim had been disallowed." (Our italics.)

The Court specifically and unqualifiedly held that the complaint did not state a cause of action because it failed to allege that the executrix had *rejected* the claim, although she had held it 84 days longer than the statutory time. In other words, *the probate code is an express statutory prohibition against the commencement of any action on a claim until it has been rejected by the personal representative of the estate.* The Court not only so held in Wormward vs. Brown, but it referred to the prior decision in Flynn vs. Driscoll as sustaining the same construction of the statute.

The rule is basic and general that the statute of limitations is tolled when one is prohibited by statute from bringing an action on his claim.

Heckman vs. Kassing, 76 Ind. App. 401, 132 N.E. 379.
Jordan vs. Jordan, Dudley 182.
Blaskower vs. Steele, 23 Ore. 106, 31 Pac. 253.
In re Anderson, 200 Minn. 470, 274 N.W. 621.
In re Smith, 218 Wis. 640, 261 N.W. 730.

Petitioner refers to Sec. 5-231, I.C.A., which provides that:

"If a person against whom an action may be brought dies before the expiration of the time lim-

ited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

This section was adopted in Idaho by the first territorial legislative session, 1864. It was taken from the California Code, but at the time of its adoption in Idaho this statute had not been construed in California as applying to *money claims* filed against the estates of deceased persons, but, on the contrary, such claims were not considered as coming within the application of this act. That was the decision of the California Supreme Court in Smith vs. Hall, 19 Cal. 85, and Quivey vs. Hall, 19 Cal. 97, and it has never been construed in Idaho as applying to money claims against the estate. At the time of the adoption of the above section there was in the Probate Code a provision in substance to the effect that if the executor or administrator refuses or neglects to endorse his allowance or rejection on the claim for *ten days* after the claim has been presented to him *"such refusal or neglect is equivalent to rejection."* Under that statute a claimant could file his claim and if it were not allowed or rejected within ten days he could bring his action, for there was then no statutory prohibition against such action. That provision of the statute was *eliminated by amendment* and after the statute had been amended the Idaho Supreme Court rendered its decision in Wormward vs. Brown, 50 Idaho 125, 294 Pac. 331, to the

effect that a creditor could bring no action on his claim until it had been *rejected* by the executor or administrator. Under the old statute it could perhaps have been argued that Section 5-231 gave a creditor ample time to file his claim and bring suit within the year after the issuance of letters of administration. Under the present statute, if Section 5-231 has any application it must be limited to other kinds of relief against an estate than claims for payment of money.

Petitioner cites the case of Miller vs. Lewiston National Bank, 18 Idaho 124, 108 Pac. 901. That decision was rendered under the old probate law and long before the amendment of 1929, but even in that case the Court holds directly contrary to petitioner's contention. On page 144 of the Idaho Reports the Court says:

> *"We are unable to find any statutory authority for the contention of the appellant that it was the duty of the respondents to have their claims either allowed or rejected and suit brought thereon within one year from the date of the issuing of the letters of administration. That is not what is meant by the provisions of Sec. 4071 supra* (now Section 5-231)." (Our italics.)

The District Court and the Court of Appeals followed the decisions of the Idaho Supreme Court in Wormward vs. Brown and Miller vs. Lewiston and what has been the uniform and established practice in the State of Idaho from the time of the adoption of the first territorial code.

When Did Respondent's Cause of Action Accrue in Idaho?

We should, perhaps, call attention to the fact that petitioner assumes that respondent as trustee could have brought suit in Idaho against the decedent upon default in payment of the several notes and claims as they respectively became due. The assumption is erroneous. The obligations were *secured* by collateral held by the Fulton Trust Company in the City of New York. Under the laws of Idaho one can not sue the debtor on a secured obligation and obtain judgment without first exhausting the security. Hence, as long as the security was held in New York no action either against the debtor or for the foreclosure on the security could be brought in Idaho. Judgment against the debtor, on a secured claim, can be only for the deficiency remaining after the sale of the collateral.

First National Bank vs. Williams, 2 Idaho 670, 23 Pac. 552.

Berry vs. Scott, 43 Idaho 789, 255 Pac. 305.

The assets securing respondent's claim were not brought to Idaho until October, 1938 (T. 138) and the Idaho statute of limitations commenced to run at that time, if at all. Respondent's suit was commenced February 6, 1940 (T. 60).

Petitioner also assumes that when respondent made advances to decedent for his living expenses, as set out in the findings of the Court (T. 130-133), he had the right to immediately bring suit for the repayment of such advances. The advances were secured by the assets in

the testamentary estate under agreement dated November ...., 1935 (Exhibit D, T. 32), and there was, of course, the implied understanding that the advances could be paid only out of the trust estate held in New York and assigned to respondent as security. The decedent had no other means of repaying such advances and they were made with that understanding. He assigned as security the only assets he had and all parties assumed the testamentary trustees would some day resume payment of dividends or deliver decedent's share in the estate. It would be absurd to assume that the decedent and respondent contemplated that the latter, when making a payment to the decedent for living expenses, could immediately serve him with process in an action to recover it. The facts do not justify such construction of the agreement for advances.

The Statute of Limitations Was Waived by Acknowledgments in Writing

Under the laws of Idaho the statute of limitations may be waived by an acknowledgment, in writing, of the existence of the debt. The acknowledgment raises an implied promise to pay as said by the Idaho Supreme Court in Dern vs. Olsen, 18 Idaho 358, 110 Pac.. 164:

> "The acknowledgment of an existing indebtedness, in the absence of a specific refusal to ever pay the debt, necessarily carries with it the implied promise to pay it at some time in the future." (Page 366, 18 Idaho Rep.).

Again the Court says (page 367):

> "An acknowledgment in writing of the existence of such a contract is the acknowledgment of a 'continuing contract' within the meaning of this statute, and simply fixes a new date from which the statute of limitations begins to run. It in no respect changes, alters or modifies the original contract; it is simply a waiver of that portion of the statute of limitations which may have run prior to the 'acknowledgment'."

The agreement prepared by petitioner as counsel for McDonald, dated November ...., 1935 (Exhibit D, T. 32) refers to the assignments of 1931 to pay decedents indebtness to respondent and provides that advances made for living expenses shall be secured under the said assignments of decedent's share in the testamentary estate.

Will Cummings as trustee rendered two full and complete accounts. Both were approved in writing by James McDonald. The first account, dated June 18, 1932 (Exhibit No. 27, not in printed record), contains a full and complete itemized statement of receipts and disbursements, showing moneys borrowed, obligations incurred, and obligations paid from December 17, 1931, to and including June 17, 1932. On each page of that account James McDonald recorded his approval. Above his signature there is the following statement:

> "The claims above shown and payments thereon are hereby approved."

McDonald particularly enumerated and approved cer-

tain obligations incurred by respondent (T. 262) and they are obviously binding on decedent's estate and secured under the assignments.

The second report made by Will Cummings, Trustee (Plaintiff's Exhibit No. 28), covers the entire period from December 17, 1931, to August 21, 1935, and hence includes again the items that were included in the first report. The second report was approved by James McDonald on January 18, 1936, in the following language:

> "I hereby approve the settlement rendered by my trustee, Judge Will Cummings, of Chattanooga, Tennessee, on the ——— day of August, 1935, in which he sets out receipts and disbursements made by him under the assignment and power of attorney from me.
>
> "This 18th day of January, 1936.
>
> (Signed) "JAMES MCDONALD."

This approval is set out in the printed record (Exhibit 12, T. 50) and some excerpts from that report were printed in the record. The trustee's second report was Exhibit 13 to respondent's claim as filed with the executor (T. 51).

Respondent's Claim as Filed with Executor Was Sufficient Both as to Contents and Form

Respondent's claim as filed with the executor contained all the information and data required by the Idaho statutes either in the claim itself or by reference. Petitioner contends that respondent did not file with his claim the contracts of assignment (Exhibits A, B, C, and D attached

to the complaint) (T. 21-34, 57-60). The claim was unusually full and complete (T. 34-57). But only a skeleton of the claim is printed in the record. The full claim was introduced as an exhibit and has not been certified to this Court with the record. The claim *was founded upon the promissory notes, checks, and vouchers* showing advances and payments to the decedent. The notes themselves were set out in the claim and *they specifically and at length state that they are secured by and that they are an assignment of both the corpus and income of McDonald's entire share in the testamentary estate* (T. 45-49). In the claim respondent refers to the documents assigning to him as trustee the testamentary trust as security for his claim, and adds (T. 36):

> *"Claimant refers to these documents for their contents, copy of which are now in the hands of the executor of this estate."*

Further over in the claim (T. 42) the respondent further stated:

> "Copies of all of said agreements are now in the hands of the executor * * * *and if any other, or further, data is desired claimant will be glad to furnish same."* (Our italics.)

It was admitted on the trial that petitioner had copies of all agreements covering respondent's trusteeship and assignments to him of decedent's interest in the testamentary estate, but petitioner claimed that he had re-

ceived them and held them as *counsel* for McDonald and not as executor of his estate. We think petitioner's contention is too technical to require further answer and that was the conclusion of the courts below. Besides, those courts concluded that the claim against the estate was not founded upon the separate agreements and assignments but upon the notes, checks and vouchers showing the moneys advanced to decedent or for his account and his obligation to repay. It was also admitted that petitioner never availed himself of respondent's offer, repeated in his claim as filed, to furnish additional proof or evidence in support of his claim. Petitioner never required any further evidence or proof or any explanation of the claim, but denied it without any suggestion as to his reasons therefor.

Trustee's Fees

That respondent is entitled to compensation for the services rendered as trustee would seem to be elementary. The Trial Court, having seen and heard the witnesses and read the numerous exhibits which are not in the printed record, said in its findings of fact (T. 136) regarding respondent's claim for compensation:

> "He is entitled to compensation for his services; he performed his duties with loyalty and faithfulness to the decedent and, by advancing his personal funds and obligating himself for money borrowed, he was able to effect settlements with creditors of said James McDonald, Jr., that saved the estate upwards of $48,000.00."

The savings actually aggregated over $50,000.00. He served as trustee for four and one-half years prior to the death of McDonald and he has since been compelled to carry on expensive litigation in order to wind up his trust and obtain the trust assets so he can pay the obligations incurred and secured thereby. He claimed and was allowed the modest charge of $11,250.00. Both courts found there was ample evidence to sustain his right to that compensation. Petitioner's contention that his compensation should be scaled down because of the reduction in the income of the testamentary estate is without merit. The refusal of the testamentary trustees to continue the payment was due to the decedent's failure to pay his income tax. That was no fault of respondent, but it greatly increased his burdens and duties, and he should not suffer for the defaults of the decedent.

The evidence was clear that no estimate was made when the contracts of December 17, 1931, were entered into as to what the income would be in view of the depression which then was spreading over all industries and seriously affecting the income from all securities.

In all fairness and under the law of trusteeships the respondent should have had reasonable compensation from the period since McDonald's death until the trust can be closed; then and not until then should the remaining assets of the testamentary trust be turned over to the executor for administration under the will.

Attorney's Fees

The petitioner, by taking possession of the trust estate in direct violation of the rights of respondent under his

assignments, forced respondent into long and expensive litigation to protect his trust and to recover the funds necessary to close his trusteeship in an orderly manner so he could pay the obligations that he had incurred as trustee and the obligations that were secured by the trust estate. It is immaterial whether the modest fee of $10,000.00 allowed by the Trial Court be based upon the general law of trusts and trustees and the right of the trustee to employ counsel or upon the provisions in the notes that (T. 49):

> "Upon default in payment of this note, maker and endorser agree to pay all costs of collection, including reasonable attorney's fee, for all services rendered by suit or otherwise, in collecting or attempting to collect this note, or any security for its payment or in any effort to further secure the same."

Two courts have found that there was ample proof to sustain the fees allowed. There are certain presumptions that may be indulged on the basis of human experience and the experience of members of the bar and members of the judiciary. Respondent appeared at the trial and testified at length under examination of his counsel. We think the Court may assume that counsel that appeared for him had been employed to represent him and that he had agreed to pay them reasonable compensation for their services. As said by the Supreme Court of Wyoming in Farmers State Bank vs. Haun, 30 Wyo. 322, 222 Pac. 45, 50:

"We do not think it was necessary to introduce evidence showing the employment of counsel by respondent bank, or that a reasonable attorney fee was to be paid to them. Counsel for respondent are officers of the Court and presumably appeared in Court as counsel representing their clients, and presumably their appearance and the services rendered by them were with full authority to do so, either under an express or implied promise to receive reasonable compensation for such services."

The Federal Court may exercise independent judgment on the presumptions that followed from the appearance of attorneys admitted to practice before their Court and as to evidence touching their compensation. Such matters are not controlled by the practice in the local courts.

"Generally in the United States attorneys at law who are employed to render services without agreement as to fee are entitled to recover reasonable compensation, a promise to pay such being implied by law."

Kline vs. Blackwell (C.C.A. 5), 63 Fed. 2d 897, 899.

Wood, on Fee Contracts of Lawyers, Sec. 18, p. 47.

Presumptions and order of proof are matters of procedure and are not governed by what petitioner claims is the unwritten practice in local courts. The conclusions of the courts below, who are obviously familiar with the law

and practice in the state courts are also conclusive on this point.

WHEREFORE we respectfully submit that petitioner has not shown any grounds or reason why the writ of certiorari should be granted.

Respectfully submitted,

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